IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. .....78-64

Matter of the Accounting of ABRAHAM D. LEVY, As Administrator of The Estate of CHARLES W. BROWN,

*Deceased,*

STATE OF NEW YORK,

*Appellant-Respondent,*

UNITED STATES OF AMERICA,

*Appellee-Petitioner.*

## JURISDICTIONAL STATEMENT

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UNITED STATES OF AMERICA,

*Appellee-Petitioner.*

## JURISDICTIONAL STATEMENT

The State of New York (Appellant) appeals from an affirmance by the United States Court of Appeals for the Second Circuit (LUMBARD, J., MULLIGAN, J. and VAN BRYAN, J.) of a judgment in the United States District Court for the Southern District of New York (CANNELLA, J.).

In an opinion decided on April 10, 1978, the United States Court of Appeals in affirming the district court held that the portion of a deceased veteran's estate which "escheats" to the United States Government pursuant to Title 38, § 5220 is not subject to New York State estate tax.

## Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit dated April 10, 1978, affirming the District Court's judgment is officially reported at 574 F. 2d 128 and is also reproduced as Appendix A to this Jurisdictional Statement.

The opinion of the United States District Court for the Southern District of New York dated July 20, 1977 exempting non-veteran administration derived assets passing to the United States from New York State's estate tax is not reported, but it is reproduced as Appendix B to this Jurisdictional Statement.

## Jurisdiction

The jurisdiction of this Court to consider this appeal is conferred by 28 U.S.C. § 1254.

The judgment was entered in the Second Circuit on April 10, 1978. The Notice of Appeal to this Court was filed in the Second Circuit on June 19, 1978. The Notice of Appeal is reproduced as Appendix C to this Jurisdictional Statement.

## Statutes Involved

Title 38, § 5220 provides:

38 U.S.C. § 5220 Vesting of property left by decedents

(a) Whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next-of-kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by him at the time of death and not disposed of by will or



otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund (hereafter in this subchapter referred to as the "Fund"), a trust fund prescribed by section 725s(a)(45) of title 31.

(b) The provisions of subsection (a) are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance and the continued acceptance of care or treatment by any veteran (admitted as a veteran to a Veterans' Administration facility or hospital) shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the provisions of this subchapter and regulations issued in accordance with this subchapter.

Article 26, § 955 of the New York State Tax Law provides:

§ 955. Resident's New York estate tax deductions

(a) General—The New York estate tax deductions for the estate of a deceased resident mean the deductions from his federal gross estate allowable in determining his federal taxable estate under the internal revenue code (whether or not a federal estate tax return is required to be filed), exclusive of the sixty-thousand dollar exemption under section two thousand fifty-two of the internal revenue code. . . .

## Issues

1. Was Congress without power to declare an escheat under 38 U.S.C. 5220 as to property which was not derived from federal benefits?

2. Did the United States Court of Appeals err in holding that non-V.A. derived assets passing to the United States under 38 U.S.C. 5220 are not subject to estate tax under Article 26 of the New York tax law?

3. Are non-V.A. derived assets passing to the United States pursuant to 38 U.S.C. 5220 deductible from the decedent's gross estate for state estate tax purposes?

## Statement of the Case

Charles W. Brown, the decedent herein, died at age 75 on March 5, 1973 in the Bronx V.A. Hospital after a four day illness. The decedent was a retired New York City teacher who, it is indicated, was a veteran of the United States Armed Forces, serving in the Navy from October 3, 1918 to January 12, 1919.

Since the decedent died intestate leaving no spouse, heirs or next-of-kin surviving, the Public Administrator of Bronx County was appointed administrator of the estate of the decedent. After being duly qualified, he marshalled the assets, paid the funeral expenses of the decedent and the expenses of administrator. *None of the decedent's assets were derived from Veteran's Administration Benefits* (Emphasis Supplied).

The administrator then petitioned the Surrogate's Court, Bronx County, for an order fixing tax on the deceased veteran's estate pursuant to Article 26 of the Tax Law. The decedent's gross estate was $72,233.00, none of which was realty. Deductions of $3,543.00 for funeral and administration expenses left a New York taxable estate of $68,690.00. The Surrogate, by order dated and entered April 4, 1974, fixed the New York net estate tax at $1,459.38.* The administrator paid the tax and four days later, on April 8, 1974 brought the captioned proceeding in the Surrogate's Court, Bronx County. (The administrator also filed a United States estate tax return and paid the federal estate tax as determined by the Internal Revenue Service.)

* The bulk of the assets of the decedent's estate were jointly held. Only those assets not otherwise disposed of pass to the United States under § 38 U.S.C. 5220.



The Surrogate adjourned the accounting proceeding on April 26, 1974 (Schedule "G" showed the United States claimed the "net proceedings pursuant to Section 5220. . . .") and ordered a citation issued to the United States as an interested party.

The United States filed objections to that part of the final accounting showing that New York State estate taxes were paid on that part of the decedent's estate ($7,066.76) which the United States claims was immediately vested in it on the death of the deceased veteran in a V.A. facility. On May 22, 1974, the United States filed a Notice of Removal in the Surrogate's Court to transfer the accounting proceeds to the United States District Court for the Southern District of New York and the United States also moved for summary judgment on the merits.

By stipulation between the State of New York and the United States, the State of New York filed a Supplemental Affidavit challenging the constitutionality of 38 U.S.C. § 5220(a) with respect to escheat of non-V.A. derived assets of decedent.

On July 22, 1977, Hon. John M. Cannella, District Judge, filed his opinion granting the United States motion for summary judgment holding that assets passing to the United States pursuant to 38 U.S.C. 5220(a) were not subject to State estate taxes. Thereafter, the Circuit Court of Appeals concluded that since § 5220(a) requires the decedent to receive care in a V.A. facility for the statute to become operable, the Congressional scheme indicated that the funds should pass wholly to the Federal Government.

## I

**The United States Court of Appeals erred in holding that non-V.A. derived assets passing to the United States under 38 U.S.C. § 5220 are not subject to estate tax under Article 26 of the New York Tax Law.**

The Circuit Court of Appeals cited *United States* v. *Oregon*, 366 U.S. 643 (1960), reh. den. 368 U.S. 870, as a basis for determining that the funds in question passed directly to the United States and that, therefore, no estates taxes were due the State of New York.

Charles W. Brown served in the United States Navy from October 3, 1918 to January 12, 1919, a period of a little over three months. He subsequently became a school teacher in the New York City School System. His estate is derived from Teacher's pension benefits and nothing in his estate in any way was related to benefits received from the Veterans Administration. Yet, under 38 U.S.C. 5220, the United States not only claims those assets but also further claims they are not subject to the New York State estate tax. The assets are first subject to payment of funeral expenses, administration expenses, and we submit, state estate taxes.

This contention is supported by the Internal Revenue Service and 38 U.S.C. 5223 (See *post*).

### A. The Congressional Scheme Of The Statute Does Not Preclude These Assets From Being Subject To State Estate Tax

The Court of Appeals in its opinion held that the language of § 5220 precludes the collection of a state estate tax. New York submits that this is incorrect. A review of the General Post Fund Statute, codified at 38 U.S.C. §§ 5220-5228 confirms that Congress recognized these assets



in question are subject to certain expenses and do not pass by operation of law to the United States.

Title 38, § 5223 provides as follows:

> "... There shall be paid out of the assets of the decedent so far as may be the valid claims of creditors against his estate that would be legally payable therefrom in the absence of this subchapter and *without the benefit of any exemption statute*, and which may be presented to the Veterans' Administration within one year from the date of death, or within the time, to the person, and in the manner required or permitted by the law of the State wherein administration, if any, is had upon the estate of the deceased veteran; and also the proper expenses and costs of administration if any ..." (Emphasis supplied).

Title 38, § 5224 further provides:

> "(Veteran's Benefits)
>
> § 5224 Disposal of remaining assets
>
> The remainder of such assets or their proceeds shall become assets of the United States as trustee for the Fund and disposed of in accordance with this subchapter. *If there is administration* upon the decedent's estate such assets, other than money, upon claim therefor within the time required by law, shall be delivered by the administrator of the estate to the Administrator or his authorized representative, as upon final distribution; and upon the same claim there shall be paid to the Treasurer of the United States for credit to the Fund any such money, available for final distribution. In the absence of administration, any money, chose in action, or other property of the deceased veteran held by any person shall be paid or transferred to the Administrator upon demand by him or his duly authorized representative, who shall deliver itemized receipt therefor. Such payment or transfer shall constitute a complete

acquittance of the transferor with respect to any claims by an administrator, creditor, or next of kin of such decedent." Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1261. (Emphasis supplied).

Both Sections 5223 and 5224 recognize that these non-V.A. assets of § 5220 are subject to expenses and claims. Both Sections also acknowledge the possibility of the assets passing through an estate administration. The statutes provide conditionally for administration. They serve to codify the decision of this Court in *Hamilton* v. *Brown*, 161 U.S. 256, 263 (1896), which held that an estate administration should be had "according to the laws of the particular state." The State of New York *does* require an estate administration proceeding.*

Even more indicative of Congressional intention on the inclusion of these assets in the gross estate in this case is 38 U.S.C. 5226 pertaining to claims by the rightful claimants for monies held in trust by the V.A. The statute reads in part:

> "Upon receipt of due proof that any person was at date of death of the veteran entitled to his personal property, or a part thereof, under the laws of the State of domicile of the decedent, *the Administrator may pay out of the Fund, but not to exceed the net amount credited thereto from said decedent's estate* less only necessary expenses, the amount to which such person or persons, was or were so entitled . . ."

The words "net" and "necessary expenses" indicate that the decedent's property is includible in the gross estate and do not immediately pass outside of the decedent's estate directly to the United States.

Here, since the decedent's assets were not derived from V.A. benefits, the claim of the United States is really a Federal escheat. In *Christianson* v. *County of King*, 239

* See 87 Cong. Rec. 5203.



U.S. 356 (1915), Mr. Justice Hughes, writing the opinion for this Court held that a state administration proceeding was necessary to determine an escheat:

> "But *it is contended* that the County, asserting escheat, did not claim as successor to the decedent—*that the jurisdiction of the Probate Court ceased as soon as it ascertained that there were no heirs, and that it had no power to declare the escheat and decree distribution to the County.*
>
> *"We cannot accede to this view.* The provision for escheat . . . was part of the scheme of distribution defined by the act and . . . *the court had the power to determine whether there were heirs and if it was found that there were none to decree distribution according to the statute."* (239 U.S. 370, 371) (Emphasis supplied).

Therefore, the Circuit Court of Appeals was incorrect in asserting that the asset passed directly to the United States. In any escheat, the assets must first pass through administration.

### B. The Court Of Appeals Should Have Applied The Law As The Highest Court In New York Has Declared

This Court has ruled in *Commissioner* v. *Bosch*, 387 U.S. 456 (1967) that a Federal Court should apply the law of the state's highest court on its own law, even when a Federal law is involved (387 U.S. at 465). After the *Bosch* ruling, the United States Court of Appeals for the Second Circuit received *Bosch* on remand and was required to determine whether the New York State Court of Appeals would have ruled in favor of the State of New York imposing state estate tax.

> "Upon remand from the Supreme Court of the United States, we conclude that the New York Court of Appeals would not follow the decision of the Su-

preme Court, New York County, in *Matter of Irving Trust Co.* (*Bosch*), but would uphold the partial release of the general power of appointment. . . ." (382 F. 2d 295 (Sept. 21, 1967)).

In the instant case, the Court of Appeals should have applied New York law. The Second Circuit would not have to contemplate on how New York's highest Court would rule. It acknowledges at p. 4 of its opinion that "the New York Court of Appeals emphatically held that property passing to the United States under 38 U.S.C. § 3202(e) [which is substantially the same as 38 U.S.C. § 5220] is subject to New York taxation."

The New York Court of Appeals in *Matter of O'Brine* 37 N.Y. 2d 81, 371 N.Y.S. 2d 453 (1975) in fact ruled on the identical issue although the Federal statute involved differed slightly.

The Second Circuit in its opinion held New York law inapplicable and overruled *O'Brine* on the grounds that the issue was federal. This would appear to contradict the ruling in *Bosch* both in this Court and the Second Circuit on remand since a Federal estate tax law was involved and, in fact, the subject of the litigation. In the case at bar, the interpretation of a Federal statute is also involved, but the threshold question is whether or not certain assets can be taxed by the State of New York. Therefore, this case fits squarely within the bounds of the *Bosch* rule and the Second Circuit should have applied *O'Brine*.

### C. The New York Estate Tax Is A Transfer Tax And, Therefore, The Character Of The Distributee Is Not Relevant To The Inclusion Of Assets In The Gross Estate

The New York estate tax is imposed by order of the Surrogate's Court on the right or privilege of the decedent



to transfer property he owned until his death. And Section 952 of the Tax Law imposes an estate tax on the "transfer of the New York taxable estate of every deceased individual who at his death was a resident of New York State."

In *Matter of Merriam,* 141 N.Y. 479 (1894), the imposition of a state inheritance tax upon the right of a decedent to bequeath personal property to the United States was deemed proper.

> ". . . Assuming this legacy vested in the United States at the moment of testator's death, yet in contemplation of law the tax was fixed on the succession at the same instant of time. This is not a tax imposed by the state on the property of the United States. The property that vests in the United States under this will is the net amount of its legacy after the succession tax is paid . . ." (141 N.Y. at 484).

Not only did this Court affirm (*sub nom. United States* v. *Perkins,* 163 U.S. 625 [1896]) but 55 years later it asserted the right of Illinois to impose a death tax on a bequest to a state instrumentality merely citing *Perkins* as authority. *Bd. of Regents of Univ. of Wisc.* v. *Illinois,* 339 U.S. 906 (1950). *Perkins* was held by this Court to be equally applicable whether the disposition was by will or no will.

To the same effect see *Chase National Bank* v. *United States,* 278 U.S. 327 (1929):

> ". . . We think the power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, or of the particular method by which his purpose is effected, so long as he retains control over those benefits with power to direct their future enjoyment until his death." (*supra,* at 338).

In *United States Trust Company* v. *Helvering*, 307 U.S. 57 (1939), this Court held that the proceeds of a War Risk Insurance Policy on the life of a deceased veteran payable to a named beneficiary were includible in his gross estate under a Federal estate tax law and the Commissioner of Internal Revenue properly included same in measuring the tax assessed on the estate.

The trust company-petitioner had asserted that 38 U.S.C. § 3101 mandated such insurance shall be exempt from taxation. Mr. Justice Black agreed that the *proceeds* were exempt from taxation under the statute *but* he added:

> "An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed upon the transfer of or shifting in relationships to property at death . . . [T]he taxing power was . . . exercised upon 'the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.
>
> "Exemptions from taxation do not rest upon implications." (307 U.S. at 60)

This Court granted certiorari in *Helvering* because "State courts have differed as to whether proceeds of War Risk Insurance are subject to death duties imposed by States. See, for example, *Re Harris*, 179 Minn. 450, 229 N.W. 78 . . . (holding these proceeds not subject to such excise); and *Re Sabin*, 224 App. Div. 702 (1928), *Re Dean*, 131 Misc. 125, 1927 (contra)." (*United States* v. *Helvering, supra*, footnote at pp. 58-59.)

The property passing to the United States on the death of the decedent is clearly includible in the gross estate for Federal estate tax purposes since the decedent owned the property at the time of his death. (I.R.C. § 2033).

I.R.C. § 2033 provides:

> "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."



Therefore, title to these assets devolves to the United States as a successor in interest through the decedent's estate. The intent of § 2033 is amplified by Treasury Reg. 20.2041-1(b)[2] which provides:

> "The power of the owner of a property interest already possessed by him to dispose of his interest, and nothing more, is not a power of appointment, and the interest is includible in his gross estate to the extent it would be includible under § 2033 or some other provision of point III of subchapter A of chapter 11."

The decedent, Charles Brown was indisputably the owner of the property in question and he certainly had every right to dispose of it. § 5220 provides that only the property "not otherwise disposed of" passes to the United States. Mr. Brown at all times controlled the succession of his property. Even though the succession of his property was not through an affirmative act such as a testamentary bequest or a joint tenancy, the property nonetheless passed to the United States as successor through Mr. Brown's act of omission. In other words, Mr. Brown, by not otherwise disposing of these assets, controlled the disposition of these assets at the time of his death. Therefore, these assets must be considered part of his estate and thus subject to tax.

To hold that property passing by operation of law is not includible in the Federal estate tax would exclude all assets such as jointly held property and insurance payable to named beneficiaries from all estate tax. Yet, these assets are all included without any doubt under I.R.C. § 2033 and then pass to the respective successor in interest.

The right to impose a New York estate tax on the estate of a deceased veteran (derived from V.A. benefits) who

died intestate, without heirs or next-of-kin, outside a V.A. facility which passes to the United States under a comparable escheat statute (38 U.S.C. § 3202[e]) has been sustained in *Matter of O'Brine, supra* (37 N Y 2d 81):

> "Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable law as to the devolution of property at death should govern the remainder and the ultimate impact of the federal tax." *Riggs* v. *Del Drago,* 317 U.S. 95, 97-98.
>
> • • •
>
> "The property of a decedent not disposed of by will, after payment of Administration and Federal Expenses, Debts and *Taxes,* shall be distributed . . ." (EPTL 4-1.1). (Emphasis supplied).

In reviewing the Congressional history of the first Federal death tax statute in 1916, in *Riggs,* Mr. Justice Murphy calls attention to the language of then Congressman Cordell Hull, the reputed draftsman, page 98, fn. 4:

> "'Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution . . .' 53 Cong. Rec. 10657."

It should also be noted that the Internal Revenue Service in its regulations discussed hereafter have always taken the position that these assets are included in the taxable estate and are then deducted.

## II

**Non-V.A. derived assets passing to the United States pursuant to 38 U.S.C. 5220 are not deductible from the decedent's gross estate for state tax purposes.**

The Circuit Court of Apeals, finding the § 5220 assets not subject to New York estate tax did not consider the deductibility of these assets from the gross estate.



Ordinarily, § 955(a) of the New York State tax law conforms the New York State estate tax deductions to those allowable under the Internal Revenue Code. Therefore, the issue of deductions will be in reference to the Internal Revenue Code.

### A. Section 5220 Assets Are Not Deductible As A Charitable Pledge Under Treas. Reg. § 20.2053-5

The United States has asserted that the assets are deductible as a charitable pledge. Such an interpretation is strained and not really applicable. The Internal Revenue Service (IRS) asserts that under § 20.2053-5, a charitable deduction is allowed to the extent there is adequate and full consideration in cash or its equivalent under Treas. Reg. § 20.2053-5.

We disagree with the IRS interpretation as applied in the instant case. Since the decedent was a veteran over the age of 65 when he applied for and received medical assistance at the V.A. facility in the Bronx, he was entitled to such assistance without charge under 38 U.S.C. § 610(a)(4).

Thus, no deduction may be claimed under § 20.2053-5 since the requirement of "adequate and full consideration" was not satisfied. And so, the applicable Revenue Ruling 75-533, which adopts Commissioner Alexander's reasoning with respect to applying 20.2053-5 to 5220 assets as a charitable pledge is erroneous since Mr. Brown was over age 65 when he received V.A. medical care and this was not contemplated in Rev. Rul. 75-533.

Furthermore, we believe the IRS Revenue Ruling to be completely erroneous because there is not a scintilla of evidence that the decedent intended to make a charitable pledge to the United States. Absent any donative intent, any deduction as a charitable pledge or gift is clearly incorrect.

### B. Section 5220 Assets Are Not Deductible As A Claim Imposed By Law Under Treas. Reg. 20.2053-4

The United States maintains that under Treas. Reg. 20.2053-4, these assets are deductible as a liability imposed by law. This interpretation is incorrect. 38 U.S.C. § 5220(a) is a "custody" escheat and not a true liability imposed by law. The property in question is to be held by the Federal Government in its custody, in trust, to be held forever available to any heirs who come forward to claim it at any time.

This position is entirely consistent with the one taken by the United States in *Matter of Hammond,* 3 N Y 2d 567 at 571, 572 (1958); Veterans' Administration Solicitor's Opinion (84-193) Feb. 5, 1946. A copy of this opinion, Federal Government Brief, pp. 49-52, filed with the Court of Appeals in *Matter of Hammond,* 3 N Y 2d 567, 581, is appended hereto (Appendix "D").

The New York Court of Appeals agreed with the Solicitor's Opinion and held that the United States, under the veteran's statute in question, does take by custodial escheat.* Therefore, if these assets are merely held in trust, subject to future claim by heirs, they cannot be deductible as a "liability imposed by law." (Treas. Reg. § 20.253-4. Even the then IRS Commissioner Alexander did not believe the United States' assertion that § 5220 assets were deductible as a claim against the estate pursuant to Treas. Reg. 20.2053-5. In his letter to then Administrator of Veteran's Affairs (Richard L. Roudebush)** it was asserted:

> "We believe that Code Section 2053, which allows deductions for claims against the estate, inapplicable . . ."

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* It is interesting to note that the U.S. Government in its *Hammond* brief at pp. 42, 43 asserts that after escheat these assets remain subject to "after appearing claimants."

** Record on Appeal, Document 2, Ex. 4, pp. 5, 6.



Thus, the § 5220 assets are not deductible.

The IRS therefore agrees with New York's position that the assets are included in the taxable estate and not deductible as a claim against the estate.

## III

## Congress was without power to declare an escheat under 38 U.S.C. § 5220 as to property which was not derived from federal benefits.

### A. *United States* v. *Oregon* Should Be Re-examined By This Court

As previously discussed, Charles W. Brown only served three months in the armed services and did not receive any of his accumulated assets from the Veteran's Administration.

While, as can be seen from the foregoing discussion, it is not necessary in this case to reach the question of the present validity of *United States* v. *Oregon,* if the question is reached, the result in that case should be re-examined by this Court in the light of subsequent opinions. This case, in which the decedent served only for a brief period in the armed forces is a fit case for such re-examination.

### B. Congress Is Intruding On The Right To Determine Intestate Succession Which Has Always Been An Area Left To The States

This Court has held in *Hamilton* v. *Brown,* 161 U.S. 256, 263 (1896), that there is no federal law of escheat, this being an area which has been left to the states.

This Court further pointed out in *Irving Trust Co.* v. *Day,* 314 U.S. 556, 562 (1942) that each State of the United States is given plenary power with respect to the laws of descent and distribution as to property within its jurisdiction.

Section 5220(a) with respect to non-V.A. assets is a classical escheat statute in that it permits the Federal Government to take property merely because the decedent died at a federal V.A. facility. The property in question was not derived from the Federal Government. The State of New York has therefore challenged the constitutionality of § 5220(a).

Although silent on New York's constitutional challenge of § 5220 with respect to non-V.A. assets, the United States Court of Appeals had referred to *United States* v. *Oregon*, 366 U.S. 643 (1960), reh. den. 368 U.S. 870, which case involved a deceased veteran who left an estate consisting of assets inherited from the estate of his predeceased brother and a small amount of unexpended veteran pension funds.

The State of Oregon contested only those assets which were inherited from the decedent's brother and would otherwise pass to the United States Government under a statute which is now 38 U.S.C. 5220(a).

The United States had appealed from the Oregon Supreme Court's affirmance of the decree of the Oregon Probate Court escheating to the State of Oregon that portion of the estate the decedent inherited from the estate of his predeceased brother ($12,755.67). The United States claimed this windfall inheritance pursuant to the General Post Fund statute (now 38 U.S.C. § 5220[a]).

> "Here, however, the government reaches not for the residue of pension funds, but for property which came to Warpouske by inheritance." (*State Land Board* v. *United States*, 222 Or. 45, 59).

On appeal to the United States Supreme Court, *sub nom. United States* v. *Oregon*, the Oregon Supreme Court was reversed and the United States was allowed to take the inheritance from the estate of Adam's predeceased brother. (*United States* v. *Oregon*, 366 U.S. at 950).



Mr. Justice Douglas, in his dissenting opinion, concurred in by Mr. Justice Whittaker, in *Oregon* eloquently espoused the position here of the State of New York:

> "I do not see how this decedent's estate can constitutionally pass to the United States. The succession of real and personal property is traditionally a state matter under our federal system . . ." 366 U.S. 649

In the case at bar the Courts are reviewing the estate of a deceased veteran whose interest in his property was derived from pension benefits conferred on him as a New York City school teacher. The benefits are therefore state derived. The State of New York has provided how the property of one of its residents shall be distributed. States have always had this right under the Tenth Amendment and until *Oregon*, no federal law has ever interfered with that right.

### C. Recent Decisions Of This Court Support New York's Constitutional Challenge

More recent decisions by this Court supports New York State's contention that 38 U.S.C. 5220(a) is unconstitutional with the respect to non-V.A. derived assets.

Although *Oregon* dealt squarely with the constitutionality of non-V.A. derived assets passing to the United States, we submit that two other cases decided by this Court leave the present validity of *Oregon* in question. Although neither case specifically refers to *Oregon*, the tenor of the decisions dictates that this 1960 decision by this Court be reconsidered.

*National League of Cities* v. *Usery*, 426 U.S. 533 (1976) holds:

> "But we have reaffirmed today that the States as States stand on a quite different footing from an

individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think that dicta from *United States* v. *California,* [297 U.S. 175], simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, *as Mr. Justice Douglas cautioned in his dissent in Wirtz* [392 U.S. 183], *allow 'the National Government [to] devour the essentials of state sovereignty.'* 392 U.S. at 205, and would therefore transgress the bounds of the authority granted Congress. . . . While there are obvious differences between the schools and hospitals involved in *Wirtz,* and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions here traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled." (*National League of Cities* v. *Usery,* 426 U.S. at 854, 855) (emphasis added).

Concededly, fire and police departments are integral parts of state services. However, the right of a state to provide for the intestate distribution of one of its residents, including a state escheat law, if the state so deems, is nonetheless essential, especially in light of the financial condition of many of our states today. The erosion of any of these essential rights afforded to the states by our Constitution can only hasten the time when the states will hand over all essential functions to the United States Government.

In a recent decision, involving rights of illegitimate children, this Court has determined that escheat is an integral operation of State Government.

"The orderly disposition of property at death re-



quires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual states. In exercising this responsibility, *a State necessarily must enact laws governing both the procedure and substance of intestate succession.* Absent infringement of a constitutional right, the federal courts have no role here, and even when constitutional violations are alleged, those courts should afford substantial influence to a state's statutory scheme of inheritance." *Trimble* v. *Gordon,* 430 U.S. 762, 771 (1976). (Emphasis added).

Thus, *National League of Cities* preserves essential state rights and *Trimble* defines intestate succession as a necessary state right.

### D. The Statutory Scheme Of 38 U.S.C. § 5220 Is Not Applicable To The Decedent As A Veteran Over The Age of 65

The Court of Appeals stated that Congress provided under § 5220 that the decedent receive hospital care under § 5220(a) and that, therefore, all assets in his estate must entirely be turned over to the United States.

Ordinarily a veteran receiving hospital care in a V.A. facility signs an agreement on his hospital application which invokes the contractual situation in § 5220, i.e. free hospital care in return for a commitment that all assets not otherwise disposed of pass to the United States upon the veteran's death. Here, the decedent was a veteran over the age of 65. Title 38 U.S.C. 610(a)(4) provides that veterans over 65 are entitled to free care in a V.A. facility. Thus, the statutory scheme of Congress for § 5220 relied on by the Court of Appeals breaks down with a veteran over 65 since he is otherwise entitled to free hospitalization under another statute. In fact, the Veteran's Administration

recognized this conflict and no longer requires veterans over 65 to sign a contract as a condition for hospital admission as it had previously done.

## CONCLUSION

1. **The United States Court of Appeals erred in holding that non-V.A. derived assets passing to the United States under 38 U.S.C. 5220 are not subject to New York Estate Tax under Article 26 of the New York Tax Law.**
2. **Non-V.A. derived assets passing to the United States under 38 U.S.C. 5220 are not deductible from the decedent's gross estate for state estate tax purposes.**
3. **Congress was without power to declare an escheat under 38 U.S.C. 5220 as to property which was not derived from federal benefits.**

This case deserves the attention of a thorough review by the Supreme Court. The State of New York alone has dozens of instances where assets are transferred to the United States under § 5220 from estates of deceased veterans. Therefore, it would be fair to assume that there are probably hundreds of estates of deceased veterans around the country. This Court has not yet ruled on the



question as to the state estate tax consequences of assets passing to the Federal Government under the so-called veteran's statutes.

Dated: New York, New York
June 27, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Appellant-Respondent*

SAMUEL A. HIRSHOWITZ
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Senior Attorney
New York State Tax Commission

# APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 464—September Term, 1977.

(Argued January 27, 1978 Decided April 10, 1978)

Docket No. 77-6150

Matter of the Accounting of
Abraham D. Levy, As Administrator
of
the Estate of Charles Brown a/k/a
Charles W. Brown, Deceased.
STATE OF NEW YORK,

Respondent-Appellant,

UNITED STATES OF AMERICA,

Petitioner-Appellee.

Before: LUMBARD and MULLIGAN, Circuit Judges, BRYAN, District Judge*

Appeal from judgment in the Southern District, Cannella, J., that New York cannot impose estate tax on veteran's estate passing by escheat to the United States under 38 U.S.C. § 5220(a).

Affirmed.

ALLAN E. KIRSTEIN, Assistant Attorney General (Louis J. Lefkowitz, Attorney

* Sitting by Designation.

General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Irwin M. Strum, Assistant Attorney General in Charge of Trusts and Estates Bureau, and Irving Atkins, New York State Tax Commission, Senior Attorney, on the brief), for appellant-respondent.

WILLIAM J. HIBSHER, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and Patrick H. Barth, Assistant United States Attorney, on the brief), for appellee.

LUMBARD, *Circuit Judge:*

This appeal confronts us with the question whether a veteran's estate which escheats to the United States under 38 U.S.C. § 5220(a) is subject to New York estate taxation. New York appeals from a judgment in the Southern District, Cannella, J., that such property cannot constitutionally be taxed by the state. We affirm this ruling because we find that the federal statute precludes state taxation of property passing to the United States under § 5220.

According to the facts stipulated to by the parties, Charles W. Brown, a physical education teacher retired from the New York City schools, served in the United States Navy from October 3, 1918 to January 12, 1919. On October 11, 1972, Brown entered the Veteran's Administration Hospital in the Bronx for treatment of a heart ailment. At the time of his admission, Brown completed an Application for Medical Benefits which included a notice, set forth in the margin,[1] that under 38 U.S.C. § 5220 Brown's estate would become the property of the United States if, while



receiving care from the Veteran's Administration, he were to die intestate with no next of kin or heir to inherit his estate. Brown was discharged from the VA Hospital on November 17, 1972, but was readmitted on March 1, 1973, for further treatment of his heart condition. Shortly thereafter, on March 5, 1973, Brown died of an acute myocardial infarction at the age of seventy-five. Brown had never married, left no next of kin entitled to inherit under New York law,[2] and died intestate. Thus, upon Brown's death, as much of his estate as had not been appointed to another person passed to the United States under 38 U.S.C. § 5220.

Abraham Levy, Bronx County Public Administrator, was appointed administrator of Brown's estate on March 16, 1973. In April of 1974 Levy filed with the Surrogate's Court of Bronx County an accounting showing that Brown's entire estate, including four bank accounts held jointly with Gertrude Farrington, a friend of Brown's, was worth $68,690.00 after deductions had been made for funeral and administration expenses. Levy's accounting recognized that the $7,066.76 of the estate not held jointly with Farrington was subject to 38 U.S.C. § 5220(a), which provides that the property of any veteran who dies intestate and without next of kin while a patient in a VA hospital, vests in the United States immediately upon the veteran's death. The administrator's accounting also showed that he had paid out of Brown's estate federal and state estate taxes on the entire $68,690.00.[3]

On April 26, 1974, the United States Attorney for the Southern District was cited by the Surrogate's Court to show cause why Levy's account of Brown's estate should not be judicially settled and allowed. In response the United States filed an objection in the Surrogate's Court to the payment of estate taxes on that portion of Brown's estate that passed to the United States under 38 U.S.C. § 5220(a). Following this, on May 22, 1974, the United States removed the proceedings from the Surrogate's Court

to the District Court for the Southern District of New York under 28 U.S.C. § 1441, asking that the federal court determine whether under federal law New York could tax property which, upon the death of the decedent, immediately vested in the United States under 38 U.S.C. § 5220.

On April 27, 1976, the parties stipulated the facts and thereafter each side moved for summary judgment. On July 20, 1977, the District Court issued its written opinion, finding that it had jurisdiction to decide the case, and that it should not abstain from doing so. On the merits, Judge Cannella ruled that Brown's property became property of the United States immediately upon his death and, therefore, that New York could not constitutionally tax the estate under McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819). It is from this judgment that New York appeals.

Appellant's argument that this action is barred from the federal courts by the Tax Injunction Act of 1937, 28 U.S.C. § 1341, is devoid of merit. The Tax Injunction Act, which forbids an injunction by federal courts against the "assessment, levy or collection of any tax under State law . . . [provided] . . . a plain, speedy and efficient remedy" may be had in state court, does not preclude actions by the United States when suing "to protect itself and its instrumentalities from unconstitutional state exactions." See Department of Employment v. United States, 385 U.S. 355, 358 (1966).[4]

Furthermore, we find this case singularly inappropriate for the invocation of the equitable doctrine of abstention. See Colorado River Water Conservation District v. United States, 424 U.S. 800, 813-17 (1976). Here there is no unsettled question of state law whose resolution could materially alter the nature of the federal claims in issue. In In re Estate of O'Brine, 37 N.Y. 2d 81, 371 N.Y.S. 2d 453 (1975), the New York Court of Appeals emphatically



held that property passing to the United States under 38 U.S.C. § 3202(e) (which is substantially the same as 38 U.S.C. § 5220) is subject to New York taxation.[5] The entertaining of federal jurisdiction in this case does not interfere with state proceedings or functions; the state tax here was paid more than three years ago and, after deciding the issue of federal law, the district court remanded to the Surrogate's Court for completion of probate proceedings. Moreover, the two most important issues in the case—the constitutionality of the New York statute and the effect of 38 U.S.C. § 5220—are matters of federal rather than state law. Accordingly, the district court properly refused to abstain.

Congress, by enacting 38 U.S.C. § 5220(a), preempted the state estate tax provisions insofar as they would apply to veterans' property escheating to the United States. By its terms, § 5220 provides that *"all . . . property,* including money and choses in action, owned by [the deceased veteran who dies intestate and without next of kin] . . . shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund" (emphasis supplied). Congress included no exception whatsoever for state estate taxes to be paid from such property. Indeed, in § 5220(b) Congress underscored the importance of this scheme by conditioning the receipt of care in a VA hospital on § 5220(a). Thus, the plain wording of § 5220 evinces Congress' intention to preclude any state estate taxation of veterans' estates passing to the United States.

Congress' purpose in passing § 5220 was to supply greatly needed funds for the General Post Fund, which provides recreation and other forms of enjoyment to ex-service men and women confined to veterans' homes and hospitals. See United States v. Oregon, 366 U.S. 643, 647 (1961). Although the scant legislative history of § 5220 does not explicitly address the question of estate taxes,

discussion on the floor of the House when the bill was being considered demonstrated Congress' intention to benefit veterans by taking from the state what would otherwise be its by escheat. See 87 Cong. Rec. 5203 (1941). Cf. United States v. Board of Commissioners of the Public Schools of Baltimore City, 432 F.Supp. 629, 632 (D.Md. 1977). It would undermine Congress' purpose in enacting § 5220 were the statute construed to permit states to tax away from the Post Fund substantial portions of the estates given it by § 5220. In light of the statute's express wording and the purpose of the statute, we hold that § 5220 precludes state taxation on property passing to the United States under § 5220.[6]

Affirmed.

FOOTNOTES:

[1] "NOTE—The law (38 U.S.C. 5220 et seq.) provides that upon the death of any veteran receiving care or treatment by the Veteran's Administration in any institution leaving no widow (widower), next of kin or heir entitled to inherit all personal property, including money or balances in bank, and all claims and choses in action, owned by such veteran, and not disposed of by will or otherwise, will become the property of the United States as trustee for the Post Fund."

[2] New York law governs the disposal of Brown's estate as the law of his state of domicile.

[3] $408.30 in federal taxes and $1,459.38 in state taxes was paid. Of this $1,459.38, approximately $85 represents state taxation of the $7,066.76 which vested in the United States upon Brown's death.

Since the time of Levy's accounting, the Internal Revenue Service (IRS) has made plain in a letter to counsel for the government its view that no federal estate tax is properly levied on property passing to the United States under 38 U.S.C. § 5220(a). The IRS, although of the view that such property is properly includible within the decedent's gross estate, states that the property's value is deductible under IRC § 2053 as a pledge which would have been deductible if made as a bequest. See Treas. Reg. § 20.2053-5. Accordingly, the federal estate tax on that portion of Brown's estate which passed to the United States apparently is no longer in issue.





[4] *United States* v. *City of New York*, 175 F.2d 75 (1949), cert. denied 338 U.S. 885 (1949), is not inconsistent with this principle, since the result in that case was based upon the abstention doctrine rather than on the Tax Injunction Act.

Moreover, there is substantial question whether the Tax Injunction Act applies to declaratory judgment actions, irrespective of the parties. See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's In Federal Courts and the Federal System 978-79 (2d Ed. 1973).

[5] Beyond ruling that New York state law imposes an estate tax on property passing under 38 U.S.C. § 3202(e), the New York Court of Appeals held in *O'Brine*, over a vigorous dissent, that Congress did not preempt such state taxation in passing § 3202(e), although it could have done so if it had wished.

[6] Plainly Congress has the power under the Constitution, art. I, sec. 8, to achieve this result. See *United States* v. *Oregon*, 366 U.S. 643 (1961). We reject New York's suggestion that the Supreme Court by its decision in *National League of Cities* v. *Usery*, 426 U.S. 533 (1976), implicitly overruled *Oregon*. *National League of Cities* explicitly dealt only with federal interference with "integral governmental functions" and, as such, reflects concern for Congressional involvement in the day-to-day affairs of the states. § 5220 in no way bears upon such integral functions, as it affects only the states' powers of escheat.

Since we find that § 5220 precludes imposition of New York estate taxes upon veterans' estates which escheat to the United States, we find it unnecessary to address the only issue of state law in this case: whether New York law provides for such taxation.

# APPENDIX "B"

## Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2229

(JMC)

In the Matter of the Accounting of

ABRAHAM D. LEVY,

as Administrator of the Estate of
Charles Brown, Deceased.

CANNELLA, D.J.:

The Government's motion for summary judgment is granted.

Decedent Charles Brown served in the United States Navy from November 1918 to January 1919. On October 11, 1972 he was admitted to the Veterans Administration (VA) Hospital in Bronx, New York for treatment for a heart condition. Upon entering the hospital Brown completed an application for medical benefits which informed him that, pursuant to § 3920 of the Veterans' Benefits Act, 38 U.S.C. § 5220, "upon the death of any veteran receiving care or treatment by the Veterans Administration in any institution leaving no widow (widower), next of kin or heir entitled to inherit, all personal property, including money or balances in bank, and all claims and choses in action,



owned by such veteran, and not disposed of by will or otherwise, will become the property of the United States. . . ."[1]

Decedent was discharged on November 17, 1972 but reentered the hospital on March 1, 1973. On March 5, 1973 Brown died intestate and without any next of kin or heirs entitled to inherit his property under the laws of the State of New York, his domicile.

On March 16, 1973, Abraham Levy was appointed administrator of Brown's estate. In April of 1974 Levy rendered his final accounting, which indicated that both Federal and New York estate taxes had been paid on that portion of decedent's property that vested in the United States under 38 U.S.C. § 5220. Thereafter, the

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[1] Vesting of property left by decedents:

(a) Whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by him at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund (hereafter in this subchapter referred to as the "Fund"), a trust fund prescribed by section 725s(a)(45) of title 31.

(b) The provisions of subsection (a) are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance and the continued acceptance of care or treatment by any veteran (admitted as a veteran to a Veterans' Administration facility or hospital) shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the provisions of this subchapter and regulations issued in accordance with this subchapter.

38 U.S.C. § 5220 (1959) (amended 1976).

*Appendix "B"*

United States removed the proceeding from the Surrogate's Court, Bronx County, to present the question of whether New York could impose its estate tax on property payable to the United States by reason of 38 U.S.C. § 5220.

JURISDICTION

The Court first must consider its jurisdiction over the instant controversy. The administrator of decedent's estate does not herein contest the propriety of removal pursuant to 28 U.S.C. §§ 1441, 1446, but he does maintain that 28 U.S.C. § 1341, prohibiting federal courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," deprives this Court of subject matter jurisdiction over the instant controversy. Aside from the fact that the Government does not seek such relief,[2] § 1341 does not apply to the United States as a party. Department of Employment v. United States, 385 U.S. 355 (1966); United States v. Woodworth, 170 F.2d 1019 (2d Cir. 1948).

It is also argued that, although the Court may possess jurisdiction over the subject matter of this suit, it should abstain from exercising this jurisdiction because "[t]he question of the validity of a state . . . tax is one which the state courts are peculiarly fitted to answer and which, therefore, a federal court should not consider." United

[2] The Court, after examining the record, has been unable to find any request by the United States Government to "enjoin, suspended or restrain the assessment, levy or collection of any tax." In fact, it appears that the tax in issue has already been paid. What is sought by the Government is a declaration of whether the funds in question are subject to New York Estate Tax.



*Appendix "B"*

States v. City of New York, 175 F.2d 75, 77 (2d Cir.), *cert. denied,* 338 U.S. 885 (1949). However, the New York Estate Tax law in question is peculiar in that, except for the tax rates, it incorporates federal estate tax law. Section 955(a) provides that

> [t]he New York state tax deduction for the estate of a deceased resident mean the deductions from his federal gross estate allowable in determining his federal taxable estate under the internal revenue code. . . .

Thus, a determination of whether decedent's property is subject to a levy of New York estate tax, a question that is dependent upon whether it is deductible under federal estate tax laws, is a determination that is within the province of the federal courts, not one that is peculiarly attuned to state court adjudication. The remaining issues in the case are purely federal in nature.

THE MERITS

On April 8, 1975 the Internal Revenue Service ("IRS") ruled that decedent's property vesting in the United States was deductible from decedent's gross estate for federal estate tax purposes pursuant to 28 U.S.C. § 2053.[3] The United States maintains that this is the correct result. However, in that this section merely makes state law applicable to federal estate taxation with respect to certain deductions, the Court fails to see and the Government has made no attempt to explain, how such section is applicable to the case at bar.

The Government's next argument is that because property passing to the United States under 38 U.S.C.

[3] On April 28, 1975 the IRS extended this ruling to all situations arising from section 5220.

*Appendix "B"*

§ 5220 "immediately vests" in the Government, it is not subject to taxation by New York State. The Government's position, found compelling by the Court, is that decedent's property vested in the United States immediately upon his death. Any taxation of it would therefore be state taxation of federal property, a result prohibited by McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819). Such a tax would not be a tax on decedent's right to transfer his property on his death, for the property passed to the Federal Government not by bequest but by operation of federal law.

The Court finds that portion of decedent's estate which vests in the United States pursuant to 38 U.S.S. § 5220 is not subject to New York estate taxation.

The United States is directed to submit a judgment on notice within five days.

So ORDERED.

.....

JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
July 20, 1977.



## APPENDIX "C"

### Notice of Appeal.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
Docket #77-6150

In the Matter of the Accounting of
ABRAHAM D. LEVY,
as Administrator of the Estate of
CHARLES BROWN, Deceased.

SIRS:

PLEASE TAKE NOTICE that the State of New York, the appellant-respondent in the above matter hereby appeals to the Supreme Court of the United States from a judgment by the United States Court of Appeals entered and filed on April 10, 1978 by the Clerk of the Court affirming the opinion of the Hon. John M. Cannella, Judge of the United States Southern District Court of New York. Appellant-respondent appeals from each and every part of said judgment.

This appeal is taken pursuant to 28 U.S.C. § 1254.

Dated: New York, New York
June 16, 1978

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State of New York
By

.....

ALLAN E. KIRSTEIN
Assistant Attorney General
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7487

*Appendix "C"*

To: Hon. Robert B. Fiske, Jr.
United States Attorney's Office
Southern District of New York
One Saint Andrews Plaza
New York, New York 10007
Solicitor General
Department of Justice
Washington, D.C. 20530



## APPENDIX "D"

### Veterans Administration Solicitor's Opinion

### 84-193

### February 4, 1946

APPENDIX

Syllabus: Escheat.

Distribution by Court Before Investigation of Existence of Heirs of Veteran Completed—Effect Where Heirs Are *Established* After Funds Are Paid to V. A. by Guardian—Appointment of Administrator and Return of Funds by V. A.—Procedure and Authority for—Section 21(3), World War Veterans Act, as Amended.

Facts: Veteran under guardianship died leaving $637.24 derived from V. A. in guardian's hands. Upon final accounting filed by guardian and representation to the Court that veteran died without heirs, court ordered guardian to return balance to United States after payment of expenses, pursuant to Section 21(3), World War Veterans Act, as amended (38 U.S.C.A. Section 450). Guardian returned $541.44 which was deposited to current appropriations in accordance with the provisions of Section 21(3), supra. Subsequent report of investigation indicates veteran was survived by a sister and probably by children of deceased brothers and sisters.

Held: If veteran is survived by heirs court order directing return of funds to United States was based on mistake of fact and there was no factual basis for escheat under Section 21(3). Under such circumstances funds were deposited in appropriation upon an erroneous premise and may be withdrawn therefrom. Upon determination that veteran was survived by heirs, they should be informed that an Administrator should be appointed to receive payment to be administered and distributed as provided by law.

*Veterans Administration Solicitor's Opinion 84-193, February 5, 1946.*

Funds should not be released to heirs or next of kin in absence of determination of heirship by court.

Memorandum from the Solicitor to Assistant Administrator for Finance.

Re: TROWBRIDGE, Sylvester B. XC-887-179.

Reference is made to your memorandum, dated January 18, 1946, attached to the claims folder of the above entitled case.

The veteran died in Los Angeles, California, on May 25, 1944, while under the guardianship of George L. Young, appointed by the Superior Court of Los Angeles County, California, on January 29, 1941, leaving a balance of $637.24 in the guardian's hands. The guardian filed his final account with the court and upon representation to the court that the veteran died without heirs capable of inheriting his estate, an order was entered by the court, under dated of September 27, 1944, directing the guardian to return the balance of assets remaining in the guardianship estate, after payment of authorized expenses incident to the closing of the guardianship, to the United States, pursuant to the provisions of Section 21(3), World War Veterans Act, as amended (38 U. S. C. A., Section 450). Pursuant to this court order the guardian forwarded to the V. A. his check payable to the Treasurer of the United States in the amount of $514.44, representing such balance of assets, which amount was deposited to the current appropriation in accordance with the provisions of Section 21(3), supra. While no definite proof of relationship has been submitted, it is now indicated, as a result of investigation by the V. A. that the deceased veteran was in fact survived by Mrs. Margaret Ann Johnson Wehrli, Fairbury, Nebraska, who alleges she is his sister, and probably by children of deceased brothers and sisters.



*Veterans Administration Solicitor's Opinion 84-193, February 5, 1946.*

Your request advice as to whether:

1. Funds returned by a guardian under the conditions as related, and deposited to the current appropriation under the provisions of Section 21(3), may be paid by the V. A. to the heirs or next of kin of the deceased veteran, upon proof of heirship.
2. If the answer to the above is in the affirmative, will payments be based on a claim submitted on Standard Form 1055 and disposed of in the same manner as are personal funds of patients?

The file indicates the order of the court authorizing return of the funds to the V. A. was based upon information that no heirs survived the veteran. Evidence submitted strongly suggests that one or more heirs did survive him and are living at this time. If he is survived by heirs the action of the court in directing return of the funds to the V. A. was based upon a mistake of fact. This being true, there was no factual basis for the escheat of the estate to the United States under Section 21(3) of the World War Vterans Act. Under such circumstances the funds were deposited in the appropriation of teh V. A. upon an erroneous premise, and may be withdrawn therefrom. Upon your determination that the veteran was survived by relatives entitled to inherit his estate, the amount deposited in the appropriation may, as stated, be withdrawn and released to the legal representative of the Veteran's estate to be administered and distributed as provided by law. The funds should not be released to heirs or next of kin in the absence of determination of heirship by the court. The alleged heirs should be informed that an administrator for the veteran's estate should be appointed in order that the court may pass judgment in the matter. The Chief Attorney at Los Angeles, California, will cooperate and advise with the alleged heirs as to the legal action required under the present facts.

(63211)

No. 78-64

# In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NEW YORK, APPELLANT

*v.*

UNITED STATES OF AMERICA

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MOTION TO AFFIRM

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-64

STATE OF NEW YORK, APPELLANT

*v.*

UNITED STATES OF AMERICA

---

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee, the United States of America, moves that the judgment of the district court be affirmed.

## STATEMENT

This is an appeal under 28 U.S.C. 1254(2) from the judgment of the court of appeals holding that a veteran's estate that vests in the United States under 38 U.S.C. 5220(a) cannot be constitutionally subject to estate taxation by the State of New York.

The pertinent facts are as follows:

The decedent, Charles Brown, a resident of New York, served in the United States Navy from November 1918, to January 1919 (J.S. App. 2a). On October 11, 1972, he was admitted to the Veterans' Administration Hospital in Bronx, New York, for treatment of a heart ailment, and died

on March 5, 1973, while a patient at the Hospital (J.S. App. 3a). Brown died intestate, and left no next of kin entitled to inherit under New York law (J.S. App. 2a-3a).

The decedent left an estate of $68,690.00 after deductions for funeral and administration expenses. The bulk of his estate consisted of four bank accounts held jointly with Gertrude Farrington, a friend of the decedent. However, the estate also included $7,066.76 worth of personal property not held jointly, title to which vested in the United States under 38 U.S.C. 5220(a). The administrator computed and paid both federal and state estate taxes on the entire $68,690.00 estate (J.S. App. 3a).

On April 26, 1974, the United States filed an objection in the New York Surrogate's Court to the payment of New York estate tax on the $7,066.76 of property that vested in the United States under 38 U.S.C. 5220(a) (J.S. App. 3a). After removal of the case to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. 1441, the district court held that New York could not constitutionally tax property that vested in the United States under 38 U.S.C. 5220(a) (J.S. App. 8a-12a).

The court of appeals affirmed (J.S. App. 1a-7a). As the court observed, 38 U.S.C. 5220 provides that "all * * * property * * * owned by [the deceased veteran who dies intestate and without next of kin] * * * shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund" (J.S. App. 5a). Congress' purpose in enacting the statute was to supply greatly needed funds for the General Post Fund, and benefit those ex-service personnel confined to veterans' homes and hospitals. The court of appeals therefore concluded: "In light of the statute's express wording and the purpose of the statute, we hold that § 5220 precludes state taxation on property passing to the United States under § 5220" (footnote omitted) (J.S. App. 6a).



## ARGUMENT

The court of appeals correctly held that New York could not constitutionally impose its estate tax upon property of an intestate veteran with no next of kin vesting in the United States pursuant to 38 U.S.C. 5220.

1. Section 5220(a) provides that when a veteran dies intestate without any next of kin while a patient in a Veterans' Administration hospital, his property that is not disposed of by will or otherwise "shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund * * *." As this Court explained in *United States* v. *Oregon*, 366 U.S. 643, 647 (1961), the purpose of Congress in enacting this statute was to supply greatly needed funds for the General Post Fund, which provides recreation to ex-service personnel confined to veterans' homes and hospitals. There, the Court upheld the statute as a constitutional exercise of Congress' power to make all laws necessary and proper to raise and support armies and rejected the claim by the State of Oregon that the statute impermissibly preempted escheat of a deceased veteran's property to the State. In so holding, the Court noted (*id.* at 648-649) that during the House floor debate on the bill Representative Jennings observed that it would "be much better to let that money go into a fund that would inure to the benefit of other veterans than to let * * * it go into a fund under the escheat laws of [a] State" (87 Cong. Rec. 5203-5204 (1941).

Recognizing the controlling force of *United States* v. *Oregon, supra,* appellant (J.S. 17) asks this Court to reexamine its decision in that case. But none of the subsequent cases cited by appellant (J.S. 17-21) casts doubt upon the vitality of that precedent. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), upon which appellant relies (J.S. 19-20), the Court held that a federal statute that established minimum wages and maximum hours of state

employees was unconstitutional on the ground that such restrictions would "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (426 U.S. at 851-852). Here, however, the limited exemption from state taxation of funds passing to the General Post Fund does not interfere with the functioning of state governments[1] (see J.S. App. 7a n.6). As the Court stated in *United States* v. *Oregon*, *supra*, 366 U.S. at 648-649 (footnotes omitted):

> Congress undoubtedly has the power—under its constitutional powers to raise armies and navies and to conduct wars—to pay pensions, and to build hospitals and homes for veterans. We think it plain that the same sources of power authorize Congress to require that the personal property left by its wards when they die in government facilities shall be devoted to the comfort and recreation of other ex-service people who must depend upon the Government for care. The fact that this law pertains to the devolution of property does not render it invalid. Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary, and proper to the exercise of a delegated power. [2]

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[1] *Trimble* v. *Gordon*, 430 U.S. 762 (1977), upon which appellant relies (J.S. 20-21), is inapposite. There, the Court struck down a provision of the Illinois Probate Act that barred illegitimate children from inheriting their fathers' estates by intestate succession. But *Trimble* turns on the Equal Protection Clause and does not involve the impact of a federal statute upon the devolution of intestates' property.

[2] Appellant further argues (J.S. 21-22) that 38 U.S.C. 5220 does not apply to the decedent in this case because he was over the age of 65, and eligible to receive free care at a Veterans' Administration facility under 38 U.S.C. 610(a)(4). But nothing in Section 5220 precludes the application of that provision to the estates of veterans who live beyond age 65.



2. Although the court of appeals did not address the question, the New York estate tax statute, properly construed, would permit a deduction for the amounts paid over to the General Post Fund pursuant to 38 U.S.C. 5220. Hence, the New York estate tax would not reach amounts from the estates of deceased veterans that vest in the United States. The judgment below can therefore be affirmed on this alternative statutory ground.

The pertinent New York statute (J.S. 3) provides that the New York estate tax deductions "mean the deductions from [the] federal gross estate allowable in determining [the] federal taxable estate under the internal revenue code * * *." N.Y. Tax Law § 955 (McKinney 1975). Under Sections 2053 and 2055 of the 1954 Code, a deduction is allowed for charitable pledges, and the Internal Revenue Service has ruled (Rev. Rul. 75-533, 1975-2 Cum. Bull. 359) that property passing to the United States under 38 U.S.C. 5220(a) is deductible as a charitable pledge from the gross estate of the deceased veteran. Hence, the amount would likewise be deductible under Section 955 of the New York Tax Law.

Appellant argues (J.S. 15) that the Commissioner's ruling is erroneous and should not govern the construction of New York law. But given the New York statutory policy of conforming its estate tax law to the federal estate tax, there is no basis for such a contention.

*In re Estate of O'Brine*, 37 N.Y. 2d 81, 332 N.E. 2d 326, 371 N.Y.S. 2d 453 (1975), upon which appellant relies (J.S. 10), does not contradict this statutory analysis and does not signal disapproval of Rev. Rul. 75-533 by the New York Court of Appeals. That case involved a transfer under a different statute (38 U.S.C. 3202(e)), which provides for an "escheat" to the United States of property owned by an intestate veteran who dies without

heirs, where such funds are derived from Veterans' Administration benefits. In holding that New York estate taxes could be imposed on the transferred funds, the court interpreted the federal statute in light of the New York law of abandoned and escheated property. Here, however, the transfer was not an escheat under New York law but was an immediate vesting in the United States that also qualified as a charitable pledge. Indeed, in ruling that the escheat was subject to New York estate taxation, the court in *O'Brine* specifically noted that in the computation of the New York "taxable estate," no deduction is allowed for "escheat" (as distinguished from "bequests, legacies, devises or transfers") either to the State or to the United States (see 37 N.Y. 2d at 85, 332 N.E. 2d at 329, 371 N.Y.S. 2d at 457).[3]

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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*Solicitor General*

OCTOBER 1978

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[3]The fact that title to the property vested in the United States by operation of a federal statute distinguishes this case from *United States* v. *Perkins*, 163 U.S. 625 (1896), upon which appellant relies (J.S. 11), where a bequest to the United States was held to be subject to estate taxation by a state.

DOJ-1978-10

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-64

Matter of Accounting of ABRAHAM D. LEVY, As Administrator of the Estate of CHARLES W. BROWN,
*Deceased,*

STATE OF NEW YORK,
*Appellant-Respondent,*

UNITED STATES OF AMERICA,
*Appellee-Petitioner.*

## ANSWERING BRIEF OF THE STATE OF NEW YORK IN OPPOSITION TO THE MOTION OF THE UNITED STATES TO AFFIRM

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### Statement

This brief is submitted by the State of New York in opposition to the motion of the United States of America pursuant to Rule 16(1)(c) of this Court to affirm "the judgment of the district court."

The facts summarized by the United States are essentially correct as stated with one exception. It is alleged (Motion 1-2) that the decedent, Charles Brown was admitted to the Veteran's Administration Hospital in Bronx, New York and died at the hospital on March 5, 1973. In fact, those dates are correct, but Mr. Brown did not continuously stay at the hospital. On November 17, 1972 he was dis-

charged and on March 1, 1973, a few days before his death he reentered the hospital.*

## Argument

In challenging the constitutionality of this statute, the State of New York believes that the rationale underlying 38 U.S.C. 5220 is founded on an implied contractual arrangement between the decedent and the United States which is inapplicable to this decedent. Ordinarily, a decedent is entitled to free hospital care at a VA facility in return for the "consideration" that if the deceased veteran dies intestate without heirs, any property of the decedent not otherwise disposed of shall pass to the United States. In the case at bar, the decedent was over the age of 65 and thus entitled to free medical care at a VA hospital under the provisions of another statute, i.e. 38 U.S.C. 610(a)4.

In a recent Internal Revenue Service Revenue Ruling, Rev. Rul. 78-14, IRB 1978-2 p. 16, the United States appears to acknowledge that 38 U.S.C. 5220 is underpinned by a contractual theory. In this ruling, a deceased veteran died intestate without heirs in a VA hospital. Rather than proceeding under 5220, the United States chose to apply a slightly different statute, 38 U.S.C. 3202(e). This statute provides that assets of the decedent derived from VA funds which would otherwise escheat to the State of decedent's residence shall instead escheat to the United States.

Since the decedent left property which was derived from VA benefits, unlike Mr. Brown, the United States could have applied either 3202(e) or 5220. Revenue Ruling 78-14 explains the reason for selecting 3202e rather than 5220:

"Unlike the statutes (38 U.S.C. sections 5220-5221)

* Application for Readmission, Doc. 8, Ex. 1, Rec. on App. The decedent never signed this document which contains footnoted language of bequest.



considered in Rev. Rul. 75-533 and Rev. Rul. 76-542, the statute under consideration does not employ any contractual language as an alternate basis for its operation.

• • •

"Thus, the obligation to return to the United States the value of funds held by a fiduciary under 38 U.S.C. Section 3202(e) is imposed solely by law without any *requirement of a contract or agreement* . . ." (emphasis supplied)

Therefore, even the United States recognizes that 38 U.S.C. 5220 was enacted to prevent a decedent from receiving free medical care to which he was not otherwise entitled from the United States and then having the decedent's property escheat to his state of residence. Furthermore, although the provisions of 5220 appeared to be squarely met, the United States chose to apply 3202(e), rather than face the problem of proving the validity of the implied contract.

The appellee also contends that New York is precluded from taxing the estate because it must follow the policy of conforming its estate tax law to the federal estate tax law. The tax law of New York does not mandate such a policy. In cases where the federal ruling is clearly erroneous, New York does not have to conform to federal law.*

Appellee maintains as an alternate argument that the property of the decedent escapes tax as a charitable pledge (Motion, p. 5). The State of New York strenuously disagrees. The transfer to the United States cannot by any means be construed as a charitable pledge. The appellee has never even suggested that the decedent was possessed of a donative intent. The United States receives these

* See New York State Tax Law § 961(a)(3). This section provides that a final federal determination is not binding if "such final federal determination is shown to be erroneous."

funds merely through the fortuitous circumstance of the decedent dying at the time he was in a VA hospital. Had the decedent died a few days earlier before he entered the hospital, the United States would have no claim to these funds.

38 U.S.C. 5226 provides that if a rightful claimant to these funds should appear, the United States must pay these funds to him.* Thus, the appellee, according to 38 U.S.C. 5220 and 5221 takes these funds not as the recipient of a charitable pledge or bequest, but as a custodian or trustee.**

Appellee has cited Rev. Rul. 75-533 as its authority for the deduction of the decedent's assets as a charitable pledge. This ruling did not consider the case of a decedent over age 65 entitled to free medical care pursuant to 38 U.S.C. 610 (a)4. Such a factor is crucial since according to the ruling, the charitable pledge is valid only to the extent that adequate and *bona fide* consideration was received.***

The appellee contends that *In Re Estate of O'Brine,* 37 N Y 2d 81, 332 N.E. 2d 326, 371 N.Y.S. 2d 453 (1975) upon which we rely to disallow the deduction of the decedent's assets is inapposite (Motion, pp. 5, 6). A different statute (38 U.S.C. 3202e) is involved in *O'Brine,* but even the Circuit Court of Appeals in the decision below noted that the

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* See J.S. pp. 8, 16.

** This Court has acknowledged a custodial escheat in *U.S.* v. *Klein,* 303 U.S. 276, 282 (1938) and in *Western Union Co.* v. *Pennsylvania,* 368 U.S. 71, 77, 78 (1961).

*** The IRS has since reconsidered the ruling with Rev. Rul. 76-542 1976-2IRB p. 37, which rejected the charitable pledge deduction because the veteran was an incompetent and therefore unable to enter into a contract. We believe that a similar result would be reached for a veteran over the age of 65 due to a lack of consideration. It should be noted that this Ruling did allow a deduction on the alternate theory of a liability imposed by law which we have discussed at J.S. p. 16.



two statutes are "substantially the same."**** Furthermore, the appellee would have an even stronger argument in conjunction with 38 U.S.C. 3203(e) since the assets of the deceased veteran were derived from benefits received from the United States. Therefore, an additional argument of a reversion of assets exists in *O'Brine* which is absent in this case.

Otherwise, the two statutes are really identical. Even though 38 U.S.C. 5220 used the term "immediately vests" rather than "escheat", funds to which the appellee would not otherwise be entitled pass to it from the estates of deceased veterans. Therefore, 38 U.S.C. 5220 triggers an "escheat" and certainly not a charitable pledge as appellee argues.

Finally, appellee asserts (Motion, f.n. 3) that *United States* v. *Perkins,* 163 U.S. 625 (1896), which we cite to demonstrate that a bequest to the United States is taxable, is not in point because the funds in the case at bar immediately vest in the United States. The appellee has relied on Rev. Rul. 75-533, *idem,* which is based on the charitable pledge theory. Since a charitable pledge is treated in the same manner as a bequest, *Perkins* cannot really be distinguished from this case.

The assets of the decedent should be included in his gross estate. Congressional intent requires that these assets be subjected to New York's estate tax. A reading of 38 U.S.C. 5223, 5224 and 5226 confirms that these assets must pass through the expense of administration, one expense of which is the state estate tax.

The Circuit Court of Appeals erred in not following the law of the State of New York as its highest court would have applied it. The highest Court in New York has ruled that a state estate tax must be paid when a deceased veteran dies intestate and his assets pass to the United States through an application of a federal statute.

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**** See J.S., p. 10.

Once included in the decedent's gross estate for tax purposes, no deduction is allowable in the State of New York. The assets do not qualify as a charitable pledge. The alternative theory proposed by the United States is a "liability imposed by law." There was no liability "imposed by law", only a federal escheat. Furthermore, the appellee takes the property of the decedent only as a trustee in a custodial capacity, thus the appellee does not have the unfettered ownership of assets to even consider the aptness of a taxable deduction.

## CONCLUSION

**The judgment of the Court of Appeals should be reversed.**

Dated: New York, New York
October 25, 1978

Respectfully submitted,

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